Supreme Court, U. S.
FILED
AUG 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6033

SHARON ROE AND DOROTHY POE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, APPELLANTS

v.

NICHOLAS NORTON, INDIVIDUALLY, AS COMMISSIONER OF WELFARE OF THE STATE OF CONNECTICUT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLEE

ROBERT K. KILLIAN
Attorney General

MICHAEL ANTHONY ARCARI
PAIGE J. EVERIN
LORNA M. DWYER
FRANCIS J. MACGREGOR
Assistant Attorneys General

90 Brainard Road
Hartford, Connecticut 06114

Counsel for Appellee

On the Brief:

MICHAEL ANTHONY ARCARI
LORNA M. DWYER
Assistant Attorneys General

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
HISTORY OF THE STATUTE	3
THE STATUTE: SECTION 52-440b OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958	8
RIGHTS OF THE MOTHER v. RIGHTS OF THE CHILD	9
I. THERE IS NO STATUTORY CONFLICT BETWEEN SECTION 52-440b OF THE CONNECTICUT GENERAL STATUTES, REVISION OF 1958, AND THE SOCIAL SECURITY ACT	10
II. SECTION 52-440b OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958, DOES NOT IMPINGE UPON ANY RIGHTS SO FUNDAMENTAL OR IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY WHICH ARE CONSTITUTIONALLY PROTECTED UNDER THE RIGHT OF PRIVACY	12
A. THE RIGHT OF PRIVACY	12
B. THE DESIRE TO KEEP SECRET THE NAMES OF PUTATIVE FATHERS IS NOT WITHIN THE BOUNDARY OF THE RIGHT OF PRIVACY	13
C. REGULATION AND COMPELLING STATE INTEREST	14
III. SECTION 52-440b OF THE GENERAL STATUTES OF CONNECTICUT, REVISION OF 1958, DOES	

TABLE OF CONTENTS

	Page
NOT VIOLATE DUE PROCESS OF LAW STANDARDS	24
A. THE STATUTE IS NOT TOO BROAD AND CONTAINS SUFFICIENT STANDARDS	26
B. "INDIVIDUALIZED HEARING"	29
IV. SECTION 52-440b DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	34
A. THE STANDARD TO WHICH THE CONNECTICUT STATUTE MUST ADHERE	34
B. NO FUNDAMENTAL CONSTITUTIONALLY - PROTECTED RIGHTS HAVE BEEN VIOLATED BY SECTION 52-440-b	36
C. THE CLASSIFICATION CREATED BY SECTION 52-440b IS RATIONAL, VALID AND DOES NOT CREATE INVIDIOUS DISCRIMINATION	41
1. THE STATUTE DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST ILLEGITIMATES	41
2. THE STATUTE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT BECAUSE OF A "SUSPECT CLASSIFICATION" BASED UPON SEX	45
3. THE STATUTE DOES NOT CREATE A "SUSPECT CLASSIFICATION" ON THE BASIS OF POVERTY	50
4. VALID, ARTICULATED STATE INTERESTS ARE RATIONALLY ADVANCED BY SECTION 52-440b	52
CONCLUSION	57

TABLE OF AUTHORITIES

Cases:	Page
Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973)	34, 35
Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195 (1957)	19
Ballentine v. Desylvia, 226 F.2d. 623 (9th Cir. 1955)	18
Bates v. Little Rock, 361 U.S. 516, 524 (1960)	31
Beal v. Ross, 11 Conn. Supp. 323 (1972)	9
Blair v. United States, 250 U.S. 273 (1919)	25
Board of Education v. Barnette, 319 U.S. 624 (1943)	32
Boraas v. Belle Terre, 476 F.2d. 806 (2d Cir. 1973)	35
Boraas v. Belle Terre, 42 U.S.L.W. 4475 (Apr. 11, 1974)	35
Branzburg v. Hayes, 408 U.S. 665 (1972)	40
Buck v. Bell, 274 U. S. 200 (1927)	14, 51
Cafeteria Workers v. McElroy, 367, U.S. 886, (1961)	29
City of New York v. Richardson, 473 F.2d. 923 (2d Cir. 1973)	34
Copes v. Malcarne, 118 Conn. 304 (1934)	5
Crowley v. Christenson, 137 U.S. 86 (1890)	14
Dandridge v. Williams, 397 U.S. 471 (1970)	36
Davis v. General Finance and Thrift Corp. 80 Ga. App. 708, 57 S.E.2d 225, (1950)	22
Davis v. Richardson, 342 F.Supp. 588 (D. Conn.) (3 Judge D.C.), Aff'd. 4 U.S.L.W. 3345 (1972)	18
Dickenson's Appeal, 42 Conn. 491 (1875)	18, 42

	Page
Doe v. Bolton, 410 U.S. 179 (1973)	38
Doe v. Bolton, 41 U.S. L.W. 4233 (1973)	14, 16
Doe v. Harder, 310 F.Supp. 302 (D.Conn. 1970)	4
Doe v. Norton, 365 F.Supp. 65, (D.Conn., 1973)	13, 19, 24, 25, 28
Doe v. Shapiro, 302 F.Supp. 761 (D.Conn., 1969)	4
Domonkos v. Rotundo, 4 Conn. Supp. 29 (1936)	16
Fedor v. Mauwehu Council, 21 Conn. Supp. 38 (1958)	15
Frontiero v. Richardson, 411 U.S. 677 (1973)	34, 45
Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968)	18, 42, 50
Goldberg v. Kelly, 397 U.S. 254 (1970)	36
Gomez v. Perez, 409 U.S. 535 (1973)	43
Goodhart v. State, 84 Conn. 60 (1910)	28
Goshkarian's Appeal, 110 Conn. 463 (1936)	15
Griswold v. Connecticut, 381 U.S. 479 (1965)	12, 38
Hartford National Bank & Trust Co. v. Prince, 28 Conn. Supp. 348 (1969)	7
Hayes v. Strauss, 151 Va. 136, 144 S.E. 432 (1928)	19
Henry v. White, 359 F.Supp. 969 (D.Conn., 1973)	35
Huntington v. McMahon, 48 Conn. 174 (1880)	27
In Re Appeal of Kindis, 162 Conn. 239 (1972)	10
In Re Clayton, 59 Conn. 510 (1890)	28
Jacobson v. Massachusetts, 197 U.S. 11 (1905)	14

	Page
James v. Strange, 407 U.S. 128 (1972)	53
Johnson v. Robison, 42 U.S.L.W. 4313 (Mar. 4, 1974)	46
Kastigar v. United States, 406 U.S. 441 (1972)	24, 40
Kelly v. Washington, 302 U.S. 1 (1937)	11
Labine v. Vincent, 401 U.S. 532 (1971)	43
Levy v. Louisiana, 391 U.S. 68 (1968)	18, 42, 50
Loving v. Virginia, 388 U.S. 1 (1967)	38
McCarthy v. Clancy, 110 Conn. 482 (1930)	26, 48
McDonald, Et Al v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1968)	34
McGinnis v. Royster, 410 U.S. 263 (1973)	35
McGovern v. Van Riper, 140 N.J. Eq. 341, 54A.2d 469, (1947)	24
McGowan v. Maryland, 366 U.S. 420 (1961)	34
McLaughlin v. Florida, 379 U.S. 184 (1964)	41
McLaughlin v. McLaughlin, 20 Conn. Supp. 274 (1957)	15
Meyer v. Nebraska, 262 U.S. 390 (1923)	12
Middletown v. Luchenbach S.S. Co., 70 F.2d. 326 (2d Cir.), Cert. Den. 293 U.S. 577 (1936)	18
Mullins v. Becker, 113 Conn. 526 (1931)	15
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	31
New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973)	42, 50

Page

Norton v. Larracuente, No. CV2-738-94960 (Conn. 2d. Cir. Ct. 1973) 51, 54

Pelak v. Karpa, 146 Conn. 370 (1959) 5, 8, 18, 19

Prince v. Massachusetts, 321 U.S. 158 (1944) 23, 39

Reed v. Reed, 404 U.S. 71 (1971) 45

Re McGrew, 183 Cal. 177, 190 P.804 (1920) 19

Richardson v. Davis, 342 F.Supp. 588 (D.Conn., 1972) 6

Rinaldi v. Yeager, 384 U.S. 305 (1966) 41, 53

Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d. 147 (1973) 12, 13, 14, 16, 36, 38, 39

Roth v. United States, 354 U.S. 476 (1957) 53

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 46

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 34, 35

Shelton v. Tucker, 364 U.S. 479, (1960) 31

Sherbert v. Verner, 374 U.S. 398 (1963) 39

Shillitani v. United States, 384 U.S. 364 (1966) 11

Snell v. Wyman, 281 F.Supp. 853 (S.D.N.Y., 1968) 11

Stanley v. Illinois, 405 U.S. 645 (1972) 29

State Ex Rel Marity v. Tyndall, 74 N.E. 2d 914 (Ind., 1947), App. Dismd., 333 U.S. 834, Reh. Den., 333 U.S. 858 24

State v. Jackson, 147 Conn. 167 (1960) 28, 29

State v. Wolfe, 156 Conn. 199, (1968, citing Pelak v. Karpa, Supra.) 8, 41

Page

Stoner v. Stoner, 163 Conn. 345 (1972) 28

Tigner v. Texas, 310 U.S. 141 (1940) 41, 53

Turner v. Metropolitan Life Ins. Co., 56 Cal. App. 2d, 862, 133 Pac.2d 859 (1943) 19

Underhill v. Bennett, 4 Conn. Cir. Ct. 443, Cert. Den. 155 Conn. 715 (1967) 5

United States v. Doe, 405 F.2d 436, (2d. Cir., 1968) 26

Van Epps v. Redfield, 68 Conn. 39, 47 (1896) 6

Vlandis v. Kline, 412 U.S. 441, 37 L.Ed. 63 (1973) 27

Walton v. Atlanta, 89 F.Supp. 309 (N.D. Ga., Atlantic Div., 1949) 24

Watkins v. United States, 354 U.S. 178 (1957) 31

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 18, 42, 50

Welfare Commissioner v. A.M.M., Case V, Appendix of Children's Brief 54

Whalen v. Olmstead, 61 Conn. 263, 267 (1891) 15, 16

Wyatt v. United States, 362 U.S. 525 (1960) 40

Zepeda v. Zepeda, 41 Ill. App.2d 240, 190 N.E. 2d 849, 857 (1963) 22

Statutes:

Title 42 U.S.C. Section 602 (A)(17) 1, 10, 52, 57

Connecticut General Statutes: (C.G.S.)

C.G.S. Section 7-48, as amended by Public Act 45 (1973) 47

	Page
C.G.S. Section 7-50	47
C.G.S. Section 7-56, as amended by Public Act 127 (1972)	47
C.G.S. Section 17-59	53
C.G.S. Section 17-82E, as amended by Public Act 616 (1973)	53
C.G.S. Section 17-320, as amended by Public Act 127 (1972)	41, 53
C.G.S. Section 17-323A	53
C.G.S. Section 17-324, as amended by Public Act 1 Section II (1972)	42, 48, 53
C.G.S. Sections 17-327, as amended by Public Act 373 (1973), through 17-355 (B)	53
C.G.S. Section 45-274	7
C.G.S. Section 46-10	53
C.G.S. Section 46-26, as amended by Public Act 373 (1973)	4, 9, 53
C.G.S. Section 51-33	27
C.G.S. Section 52-435a	4, 40, 53
C.G.S. Section 52-435b	5, 40
C.G.S. Section 52-435c	5, 40
C.G.S. Section 52-440a	6, 32, 48
C.G.S. Section 52-440b	1, 2, 8, 10, 12, 14, 15, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 47, 48, 49, 51, 56, 57

	Page
C.G.S. Section 52-442	41
C.G.S. Section 52-442A	41
C.G.S. Section 52-445	53
C.G.S. Section 52-590	4
C.G.S. Section 53-304, as amended by Public Act 127 (1972)	48, 53
C.G.S. Section 54-81a	30
Connecticut Public Act No. 73-373, Section 16 (1973)	5, 9
Journals:	
Connecticut General Assembly House Proceedings, 1971, Vol. 14 pt. 8 May 21, 1971, pp. 3521-3522	46
22 University of Miami Law Review 884 (1968) "Does The Bastard Have A Legitimate Complaint?"	22
Books:	
10 Am. Jur. 2d, Bastards, Section 8 (1963)	18
22 A.L.R. 3rd 1441 (1968)	19
Black's Law Dictionary, 310 (4th Edition, 1957)	27
Connecticut Practice Book Section 374 (as amended September 1, 1970)	9
8 Wigmore Section 2197	25

SUMMARY OF ARGUMENT

Section 52-440b of the General Statutes of Connecticut, Revision of 1958 does not conflict with either the letter or the spirit of the Social Security Act. Rather it acts to further one of the purposes of that act by providing for the disclosure of the identity of the putative father — information which is essential to carrying out the policy of Title 42 U.S.C. Section 602(a)(17) to establish the paternity of illegitimates and secure paternal support for them.

Section 52-440b does not violate any of the rights of personal privacy guaranteed under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution. The Statute seeks the disclosure from mothers of the identity of the fathers of their children in an effort to protect the welfare of children. The purpose of the statute is to aid the State in its comprehensive scheme to protect the interest of children, which is of a paramount interest to the State of Connecticut. In carrying out this state policy, Section 52-440b does not trample upon the Constitutional rights of mothers, such as the Appellants.

The Appellee argues that the Appellant-mothers do not have rights which fall within the boundary of the right of privacy. Even if any rights of the Appellant-mothers do touch upon the boundary of privacy, the Appellee's position is that such rights are not so fundamental and are not so absolute as to be violated by the provisions of Section 52-440b. It is the further position of the Appellee that if the Appellant-mothers' desire to keep secret the names of the fathers of their children falls within the boundary of the right of privacy, its regulation is justified by the interest of the State of Connecticut in protecting the welfare of children, whether such interest is characterized as "compelling" or otherwise. Such interest is

found in Section 52-440b and such statute is narrowly drawn to express this legitimate state interest.

When weighed against the government's power of inquiry pursuant to a legitimate governmental task, the provision of Section 52-440b which requires the Appellant-mothers to disclose the names of the fathers of their children does not contravene any right to remain silent protected by the First Amendment of the United States Constitution. The requirement of disclosure under Section 52-440b is not compulsory and may be applied in accordance with the sound judicial discretion of the Connecticut Circuit Court. The provision of Section 52-440b which states that the Appellant-mothers may be compelled to institute paternity proceedings is also not compulsory, falls under the Connecticut Circuit Court's power to exercise sound judicial discretion, and is no more than the Connecticut legislature's expression of a subrogation claim.

Substantively, the reasonableness of Section 52-440b does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In its application, the statute permits the Connecticut Circuit Court to exercise sound judicial discretion. Nor does the statute interfere with the exercise of due process procedural standards. As regards this latter point, Section 52-440b is not too broad and contains standards which protect any due process right that the Appellant-mothers have a right to exercise under the Fourteenth Amendment. In addition, the statute does not preclude the following: notice, the right to counsel, a meaningful hearing, the opportunity to present evidence, and a right of appeal.

The statute in question does not violate any "fundamental right" to privacy. Merely by having had an illegitimate child the mother's situation has already become public knowledge to some extent. There is little "privacy" left to be violated

in such cases; however, the interests of the illegitimate child to the establishment of paternity and support and of the state for recoupment of public funds expended for AFDC certainly outweigh that of the mother in privacy. Further, the Connecticut laws provide the mother with immunity from criminal prosecution for any matter about which she testifies in connection with paternity proceedings so she is not required to incriminate herself. The statute does not involve any cruel or unusual punishment as there is no suspension of AFDC benefits for failure to comply and the imposition of contempt for failure to testify is a time-honored sanction.

The law is based upon an inherently suspect classification: rather than discriminating against illegitimates Section 52-440b is part of a general plan to place them upon an equal footing with legitimates and to benefit them; naturally this statute is directed only against mothers since they are in the unique position of being the only ones with information regarding the child's father — such a situation of limited information does not occur regarding other legally liable relatives; and the statute is not directed simply against the poor as is apparent from its face. In any case, the interest of the illegitimate child in the establishment of his paternity and support and of the state in recouping money paid for public assistance is a compelling state interest which is rationally furthered by this law. Thus, there is no denial of equal protection.

HISTORY OF THE STATUTE

It is impossible to institute a suit to establish the paternity of a minor child unless you know the name of the putative father, who is the potential defendant who must be served with civil process. This proposition sounds simplistic and elementary but it is the root of the problem facing the Court in this action.

For a long time prior to the decisions in *Doe* v. *Shapiro*, 302 F. Supp. 761 (Conn. 1969) and *Doe* v. *Harder*, 310 F. Supp. 302 (D. Conn.), the Appellee Welfare Commissioner handled the problem of the non-disclosing mother of an illegitimate child by terminating the public assistance benefits of the mother and the child. After this decision, the Appellee commenced to cut off benefits to the mother but not to the child. These procedures were held invalid by the Federal Courts basically on the theory that by so acting the Welfare Commissioner was adding a condition to A.F.D.C. eligibility not provided for in the Federal Social Security Act, and, in effect, was visiting the sins of the mother upon the child.

In Connecticut there is a three year statute of limitations with respect to paternity suits, i.e., three (3) years from the birth of the child or three (3) years from the cessation of support by the putative father, *Sections* 52-435a *and* 52-590 *of the General Statutes of Connecticut, Revision of* 1958, or one (1) year after judgment in an action for dissolution of marriage when a child born during marriage has been determined not to be the legitimate issue of such marriage. *Section* 46-26*b(b) of the General Statutes of Connecticut, Revision of* 1958. Of course, absence of the defendant-putative father from the jurisdiction can be considered as a tolling mechanism of the statute of limitations as provided in *Section* 52-590 *of the General Statutes of Connecticut, Revision of* 1958.

The protection of minor children, their rights and their status of legitimacy is a matter of great interest and import to the State of Connecticut. Thus, the legislature has again recently and formally recognized this by providing for the appointment of an attorney to represent children in actions for the dissolution of marriages wherein the court determines that the interests of minor children are not being adequately protected and that such appointment is in the best interest of

the children. *Connecticut Public Act No.* 73-373, *Section* 16 (1973).

It is very common and in many instances necessary for the Juvenile Courts of this State to appoint separate attorneys to represent the interests of minor children in actions wherein their parents are charged with neglect or child abuse, or in actions in that forum to terminate parental rights.

The severance of welfare benefits having been precluded as a means of ascertaining the identity of the father of an illegitimate child, the legislature determined that it would be proper to cause these women to be cited in before the Connecticut Circuit Court to disclose the name of the putative father. This is an action independent entirely and not connected to welfare eligibility. This is the first stage of the legal process of bringing a paternity case to trial. Paternity or Bastardy matters in Connecticut are civil in nature and rules respecting civil actions apply. *Copes* v. *Malcarne*, 118 Conn. 304, 305 (1934); *Pelak* v. *Karpa*, 146 Conn. 370, 372 (1959); *Underhill* v. *Bennett*, 4 Conn. Cir. Ct. 443, 444 cert. denied, 155 Conn. 715 (1967).

The legislature in the furtherance of the civil objectives of the paternity statutes has provided for immunity from criminal prosecution for the mother and putative father. *Sections* 52-435*b and* 52-435*c of the General Statutes of Connecticut, Revision of* 1958.

As is contained in the stipulation filed by counsel in the case at bar, it is our opinion and contention that the statute in question in this case, and the sanctions provided therein are essentially civil in nature. See Appendix, page 56. The Attorney General would not take a position, in the event that the sanctions were invoked by the Connecticut Circuit Court, other than that the mother could purge herself by disclosing the name of the putative father.

In times long gone by, the interest that a mother had was a pecuniary one, and indeed paternity actions were conceived and authorized to allow the mother to compel the putative father to assist her in the maintenance of the child. *Van Epps* v. *Redfield*, 68 Conn. 39, 47 (1896). However, first with the advent of town welfare, and now with the predominance of federally funded State Welfare Programs (A.F.D.C.) the pecuniary interest has in many cases become one that the government is interested in, as well as the mother. In these times, indeed, the state or any town interested is authorized to institute or continue paternity proceedings. *Section* 52-440*a of the General Statutes of Connecticut, Revision of* 1958.

But, aside from the current pecuniary matter of support, there are other valuable, existing and potential rights, that the illegitimate child has, or may have, that demand the ascertaining and establishing of his paternity.

He has the potential right to share in the Social Security Benefits and Veterans Benefits derived through a wage earning father who dies, and the rights of the illegitimate child to be treated without discrimination in favor of a legitimate child have recently been set forth and established by the United States Supreme Court, in affirming the judgment in *Richardson* v. *Davis*, 342 F.Supp. 588 (U.S.D.C. Conn. 1972). This non-discrimination between legitimate and illegitimate children is the trend in the law. For other instances of equal benefits to these two classes of children, see *Ruling on Application for Preliminary Injunction, Blumenfeld,* Ch. J., page 14 of Appendix.

The status of legitimacy, or of having knowledge and proof of one's paternity is a real and substantial asset to a person, perhaps more so in later life than in the earlier years. It means, for example, that when an application for employment, or security clearance, or a passport, or any of the

myriad of forms that we file in our daily lives, are filled out by an illegitimate child, he can fill in the blanks pertaining to "FATHER", and he does not have to leave them blank raising red flags for more questions to be asked by employers or government officials concerned with processing such forms.

Next we must consider the question of rights that do attach now, or may attach in the future with respect to inheritance. To some extent the legislature has already provided for inheritance rights in children, born illegitimate whose parents thereafter intermarry. *Section* 45-274 *of the General Statutes of Connecticut, Revision of* 1958. It is not inconceivable that our state legislature may specifically provide for full rights of inheritance by a child from its natural and adjudicated father. This certainly would be in line with the trend in the law as noted by Blumenfeld, Ch. J. in his earlier ruling in this case on the application for preliminary injunction. Appendix, page 14.

There exists, under the present state of our law, the valuable status of being the child of an individual male. See *Hartford National Bank & Trust Co.* v. *Prince*, 28 Conn. Supp. 348, 261 A.2d 287 (1969). This was a very illustrative case, although not involving a paternity action as such. This involved an action brought by the trustee under a will and the trial of the case evolved into a species of equitable paternity action which established that a child born to a man's former wife, before a final judgment of divorce, was one of his children, and as such entitled to take under the provisions of his aunt's will that left her estate to the father for his life and upon his death to his surviving children for their lives. Thus, to have one's paternity established by whatever suitable means, probably confers upon the child membership in a class of children who can take estates under documents of testacy.

The Statute: Section 52-440b of the General Statutes of Connecticut, Revision of 1958.

This section is one of several statutes in our law designed to protect and further the rights of children. The provisions for requiring a mother to disclose the identity of the child's father embraces all mothers of illegitimate children, and not just those of any particular class. Thus, it is evident that there is no indivious classification of just some mothers of out-of-wedlock children that would give rise to a discriminatory legislative classification.

The statute has for a purpose the protection and establishment of present and future rights of innocent minor children, as well as the judicially recognized public policy of saving the public from the burden of supporting an illegitimate child. *State* v. *Wolfe*, 156 Conn. 199, 203 (1968 citing *Pelak* v. *Karpa*, supra). The Connecticut Supreme Court in *State* v. *Wolfe*, supra at 203, went on to point out that "in addition to the problem of paternal support for the illegitimate child, the law from early times, has been concerned with its status."

Section 52-440b deals with the rights of the class of illegitimate children. The basic, raw figures available from the Department of Health, State of Connecticut, contained in an exhibit before this court indicate that there were, in the year 1971, 45,633 recorded births in this State. Appendix, page 61. Of these, 4,533 or 9.9% were illegitimate. Appendix, page 61. We are dealing with a substantial class of people. These figures are derived from recorded birth certificates in which no fathers are named. We know from our experience in the Superior Court of Connecticut, Family Relations Session, that the actual number of illegitimate children exceeds this figure. There are many children born to married women where the birth certificates allege that their husbands are the fathers of the children, when in fact they are not. This fact usually

only comes to light when a divorce between the natural mother and presumed father ensues. In this state, a child born during the period of a marriage is presumed to be the legitimate child of the marriage.

Beal v. *Ross*, 11 Conn. Supp. 323 (1972). This recurring problem of de facto illegitimate children became such a prevalent issue in divorce actions that the Connecticut legislature enacted *Section* 46-26b *(b) of the General Statutes of Connecticut, Revision of* 1958, *and Section* 16 *of Connecticut Public Act No.* 73-373 (1973) and the judges of the Connecticut Superior Court changed the rules of pleading in divorce actions so as to require the pleading of all minor children born to the mother since the date of the marriage (Connecticut Practice Book Section 374, as amended September 1, 1970). The earlier provisions had just required that every complaint shall state "whether or not there are minor children of the parties", which permitted the mother or father to make a capricious election as to whether any particular child was in fact issue of said marriage. It can be seen that the legislature and the courts have recognized and continue to provide for handling problems of illegitimate children.

Rights of the Mother vs. Rights of the Child.

Assuming, arguendo, that the illegitimate child has some quantum of rights, we now arrive at the heart of this controversy before the Court. Shall a mother be allowed the unfettered exercise of whatever rights that she alleges to have, or has in fact, when such exercise by the mother has or may have a material effect upon the status, rights and future life of her illegitimate child. To paraphrase a statement attributed to the late, revered Justice Black: a man may have a constitutional right to flail his arms about as he pleases, but the unrestricted exercise of that right is curtailed at the end of my nose. Is not the birth of an illegitimate child, an individual, sui generis, the end of the proverbial nose at which point the unfettered actions of its mother become fettered with the demands of

the best interests of the child? Indeed, the case law and legislative enactments that govern the operation of the Connecticut Juvenile Courts have so declared when parental action is deemed to be abusive or neglectful to minor children. The whole concept of the law governing parent-child relationships is geared to that course of conduct which is in the best interests of the child, and the welfare of the child. *In Re Appeal Of Kindis*, 162 Conn. 239 (1972). Why should a mother be permitted, by her inaction, to cast her child into the eternal caverns of illegitimacy.

I. There Is No Statutory Conflict Between Section 52-440b of the Connecticut General Statutes, Revision of 1958, and the Social Security Act.

In pertinent part Title 42 U.S.C. Section 602 (a)(17)(A)(i) and (ii) reads:

> "(a) A state plan for aid and services to needy families with children *must* . . .
>
> (17) provide —
>
> (A) for the development and implementation of a program under which the State agency will undertake —
>
> (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and
>
> (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support. . . ."

Section 52-440b of Connecticut General Statutes, Revision of 1958, is narrowly drawn to assist in carrying out the

above program required by Congress. In order to establish the paternity of an illegitimate child and secure support for him it is necessary first that the name of the putative father be available, and that an action be started against him in which, most likely, the mother, if she is not the complaining party, will at least be the chief witness. Thus, the Connecticut statute can hardly be said to conflict with this federal statute.

Nor does there appear to be any other federal statute with which Section 52-440b is in such "direct and positive conflict that the two acts cannot be reconciled or consistently stand together." *Kelly* v. *Washington*, 302 U.S. 1, 10 (1937) *Snell* v. *Wyman*, 281 F.Supp. 853, 869 (S.D. N.Y. 1968) aff'd. 393 U.S. 323 (1969).

As will be discussed below the invasion of privacy involved as a result of the enforcement of this statute is truly minimal and certainly outweighed by the interests of the child and the state. While it is urged by Appellants that this act is inconsistent with the protection of children receiving AFDC which is a major reason for the federal law, this contention is largely a question of policy for the legislature as to what is in the children's best interests. Further, there is no deprivation of AFDC benefits to either child or mother as a result of the Connecticut law. Finally, the fact that the mother may, in the Court's discretion, be held in contempt of court and sent to jail can hardly be argued to invalidate the law here. The court would merely be imposing the time-honored sanction of contempt and imprisonment in a civil proceeding for failure to testify. There is no punishment involved because a woman has borne an illegitimate child. This is "essentially a civil remedy designed for the benefit of other parties and [which] has quite properly been exercised for centuries to secure compliance with judicial decrees." *Shillitani* v. *U.S.* 384, U.S. 364, 368 (1966)

The Connecticut statute involved clearly furthers an

enumerated purpose of the federal AFDC legislation and does not provide the direct and positive conflict with any other federal law which would require the overturning of the statute as contrary to the Social Security Act.

II. Section 52-440b of the General Statutes of Connecticut, Revision of 1958, Does Not Impinge Upon Any Rights So Fundamental or Implicit in the Concept of Ordered Liberty Which Are Constitutionally Protected Under the Right of Privacy.

With respect to the right of privacy question in the case at bar, it is essential to examine three things as follows: one, the origin of the right of privacy; two, whether the Appellants have rights falling within the boundary of the right of privacy; three, whether any rights that the Appellants may have justify regulation under *Section 52-440b of the General Statutes of Connecticut, Revision of* 1958.

A. The right of privacy:

The right to privacy protected by the Constitution of the United States emanates from "penumbras" of the first, third, fourth, fifth and ninth amendments. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The right to privacy also finds its roots in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. See *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). In considering the right of privacy as protected by the United States Constitution, the Court in *Roe* v. *Wade*, 410 U.S. 113 at 152, 35 L.Ed. 2d 147, 176-77 (1973), stated the following:

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only

> personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." (citations omitted).

Thus, a basic question presented to the Court in this case is whether a mother's desire to keep the name of the child's father secret is so fundamental as to require protection under the Constitutional guarantee of personal privacy irrespective of the child's interest and welfare. Even if such desire on the part of the mother does involve a fundamental right, its regulation may be justified by a "compelling state interest" by way of a statute narrowly drawn "to express only the legitimate state interest at stake." *Roe* v. *Wade*, supra, at 155, 35 L.Ed. 2d 147, 178.

B. The desire to keep secret the names of putative fathers is not within the boundary of the right of privacy:

The inquiry to and the disclosure by the Appellants as required by Section 52-440b does not invade any zone of privacy. Any "embarrassing" information concerning the consenting parents, the Appellants and the fathers of their children, has in large part been widely disclosed before any inquiries under Section 52-440b are made. *Doe* v. *Norton*, 365 F.Supp. 65, 77 (1973). The inquiry does not draw into question the mother's misconduct, but only the identity of the putative father. Id. The lower court in *Doe* v. *Norton*, supra at 77, went on to say the following:

> "The question asked of the unwed mother is, 'Who is the father of your child?' The object of the inquiry is to enforce a familial monetary obligation, not to interfere with personal privacy. There is no intrusion into the

home nor any participation in interpersonal decisions among its occupants, even to the extent held permissible in *Wyman* v. *James*, 400 U.S. 309 (1971). The statute does not forbid an unwed mother to have a man in the house or even in her bedroom. Compare *King* v. *Smith*, supra, 392 U.S. 309. The only restriction it imposes upon either the unwed mother or the biological father to do as they please or make any decisions they wish in whatever relationship they desire to maintain is that the father satisfy his legal obligation to support his own child and that the mother provide what information she possesses useful toward that end."

In view of what was pointed out by the lower court, the Appellants desire to keep secret the names of the putative fathers is not within the boundary of the right of privacy. Consequently, any compulsion placed on the Appellants by Section 52-440b does not impinge on any fundamental rights of the Appellants related to privacy.

C. Regulation and compelling state interest:

The possession and enjoyment of all rights guaranteed under the United States Constitution are not absolute, but are subject to limitations such as the reasonable conditions which may be deemed by the local governing authority essential to the safety, health, good order and morals of the community. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26 (1905); *Crowley* v. *Christensen*, 137 U.S. 86, 89 (1890); see *Buck* v. *Bell*, 274 U.S. 200, 207 (1927). Limitations on constitutional rights have been recognized with respect to the right of personal privacy guaranteed by the United States Constitution. *Roe* v. *Wade*, supra at 155, 35 L.Ed.2d 147, 178; *Doe* v. *Bolton*, 41 U.S.L.W. 4233, 4236 (1973). It is the Appellee's position that any constitutional rights of personal privacy as alleged by the Appellants in the case at bar are not so fundamental and are not so absolute as to be

violated by the provisions of *Section 52-440b of the General Statutes of Connecticut.*

In answer to the Appellants' constitutional challenge to Section 52-440b on the basis of its violation to their personal privacy, the Appellee asserts that the interest of the illegitimate child as well as the interest of its parents should be considered separately as well as collectively. In this regard, some background as to the illegitimate child's interest and welfare will be helpful.

The State of Connecticut, under the doctrine of parens patriae, has an interest in the welfare of the minor child. *Goshkarian's Appeal*, 110 Conn. 463, 468 (1930); see *Whalen* v. *Olmstead* 61 Conn. 263, 267 (1891); cf. *Mullins* v. *Becker*, 113 Conn. 526, 530 (1931); *McLaughlin* v. *McLaughlin*, 20 Conn. Supp. 274, 277 (1957). It has been stressed that the welfare of the minor child is paramount to all other considerations. *Goshkarian's Appeal*, supra; see *Mullins* v. *Becker*, supra; *Whalen* v. *Olmstead*, supra; *McLaughlin* v. *McLaughlin*, supra. It has always been the policy of our law to attempt in every way possible to protect minor children. *Fedor* v. *Mauwehu Council*, 21 Conn. 38, 41 (1958).

The State's interest in minor children and the State's policy in protecting minor children are such as to permit the State of Connecticut even to alter the parent and child relationship, in certain well defined situations, in so far as protecting the welfare of the minor child. For example, the Court in *Goshkarian's Appeal*, supra, at page 468 stated the following:

"... it must be borne in mind that parents have no right of property in their minor children of which they cannot be deprived without their consent. Their rights are not absolute rights; they may be forfeited by their own conduct. The relation of parent and child is a status not

> a contract, and that status may be altered or abrogated by the state as *parens patriae* in the interest of society. The welfare of the child is paramount to all other considerations, and the right of the parent to its custody and control must yield to the State when, because of the neglect of its natural guardians, the State assumes its guardianship and protection. *Whalen* v. *Olmstead*, supra; *Woodward's Appeal*, 81 Conn. 152, 166, 70 Atl. 453; *Purinton* v. *Jamrock*, 195 Mass. 187, 80 N.E. 802; *1 Schouler on Domestic Relations* (6th Ed.) Section 720."

With respect to the State's interest in minor children and the State's policy in protecting minor children, Connecticut law recognizes that the community has a vital interest in the illegitimate child and regards the illegitimate child as a ward of the State to a certain extent, at least to the extent in determining the paternity of such a child. *Domonkos* v. *Rotundo*, 4 Conn. Supp. 29, 30 (1936).

Not only does a state have an interest in the welfare of a living minor child, but it has an interest in the welfare of the yet unborn child. *Roe* v. *Wade*, supra at 162; 37 L.Ed.2d 147, 182; *Doe* v. *Bolton*, supra at 4245 (concurring opinion).

In *Roe* v. *Wade*, supra, the Supreme Court of the United States passed upon the question of whether the state has an interest in limiting the exercise of personal privacy in connection with the regulation of abortions. In that case, the Court pointed out that the state may decide at some point of time another interest, that of health of the mother or that of potential human life, becomes significantly involved in an abortion situation which may justify some state regulation over the abortion as a compelling state interest. *Roe* v. *Wade*, supra at 159; 37 L.Ed. 2d 147, 180. It is at this point that the "woman's privacy is no longer sole and any right of privacy

she possesses must be measured accordingly." Id. The Supreme Court further pointed out the following:

> "These interests (that of health of the mother and that of potential human life) are separate and distinct. Each grows in substantiality as the woman approached term and, at a point during pregnancy, each becomes 'compelling'. Id. at 162; 37 L.Ed. 2d 147, 182".

So far as the case at bar is concerned, if the privacy of a woman bears some relationship to the welfare of her illegitimate child, whose paternity has not been established, so that benefits and fundamental rights of the child may be denied or seriously impeded simply by the woman's refusal to disclose the name of the child's putative father for whatever reason she deems appropriate, then it becomes important to weigh the woman's privacy against the child's rights and welfare and measure the woman's privacy accordingly. For example, if a woman has the power to determine whether her minor child is ever to know his father and/or to determine whether the child will ever be able to establish his paternity, whether for the reason of support or otherwise, the state may very well have enough of a compelling interest justifying some regulation of woman's privacy in the interest of the community. In such a case, the woman's interest may not necessarily be the same as her child's interest and may very well be adverse to her child's interest. A woman's need and love of her child's father not only differ from her child's need and love for the father, but is certainly expressed differently and lead to different results in life.

It should be noted that in the foregoing cited authority, no distinction is made by the court as to legitimacy and illegitimacy with respect to the future welfare of the minor child. In fact, distinctions as to illegitimacy have always been on the decline since common law.

At common law, the illegitimate child was considered the child of nobody, thereby suffering severe restrictions as to the rights enjoyed by the legitimate child. 10 Am.Jur. 2d, *Bastards* Section 8 (1963). Most states have departed from the common law rule by passing statutes conferring upon the illegitimate child rights previously denied under common law, a trend of increasing liberality as to the status and rights of the illegitimate child. Id.

The State of Connecticut's interest in promoting the welfare of the illegitimate child has always been on the increase. Even from the beginning of instituting our legal system, Connecticut refused to accept the common law rule that an illegitimate child was nullius filius. *Pelak* v. *Karpa*, supra at 372. Connecticut recognized the illegitimate child as the child of his mother, with all the rights and duties of a legitimate child, including the rights of support and inheritance. Id; *Dickenson's Appeal*, 42 Conn. 491, 503 (1875). This aspect of promoting the welfare of the illegitimate child has been further demonstrated where, in accordance with the trend of increasing liberality as to the status and rights of the illegitimate child, the courts have refused to allow the illegitimate child to be deprived of certain benefits which are enjoyed by the legitimate child. These court cases have been previously noted by the lower court in the case at bar and are as follows:

> "... *Weber* v. *Ætna Cas. & Sur. Co.*, 406 U.S. 164 (1971) (workmen's compensation benefits); *Glona* v. *American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968) (wrongful death statute); *Levy* v. *Louisiana*, 391 U.S. 68 (1968) (wrongful death statute); *Davis* v. *Richardson*, 342 F.Supp. 588 (D.Conn.) (3-Judge District Court), *aff'd* 41 U.S. L.W. 3345 (1972) (Social Security death benefits); *Ballentine* v. *DeSylva*, 226 F.2d 623 (9th Cir. 1955) (copyright statute); *Middletown* v. *Luchenbach* S.S. Co., 70 F.2d 326 (2d Cir.), *cert. denied* 293 U.S. 577 (1934)

> (death on the high seas, 'children' includes illegitimates); *Turner* v. *Metropolitan Life Ins. Co.*, 56 Cal. App. 2d 862, 133 Pac.2d 859 (1943) ('children' in life insurance policy includes illegitimate children)." *Doe* v. *Norton*, supra. (ruling on application for a preliminary injunction), Appendix, page 19.

Courts have even gone further in permitting the illegitimate child to obtain other benefits other than those above cited. Where proven to be beneficial to the illegitimate child in a particular case, the trend in some states has been to grant greater rights to the father over the illegitimate child than previously enjoyed by the father. E.g., *Bagwell* v. *Powell*, 267 Ala. 19, 99 So.2d 195 (1957) (right of putative father to visit illegitimate child); *Hayes* v. *Strauss*, 151 Va. 136, 144 S.E. 432 (1928) (right of putative father to custody of illegitimate child where mother deceased); *Re McGrew*, 183 Cal. 177, 190 P.804 (1920) (obligation to obtain consent of the father of an illegitimate child to its adoption). It is worthy to note that some states have passed upon the question of tort liability of a parent for wrongful causing one to be born (no recovery having yet been allowed). 22 A.L.R. 3d 1441 (1968).

No list of benefits with respect to the illegitimate child is complete without reference to the question of support for such child. The right of support for the illegitimate child from his mother has always been basic to the welfare of the illegitimate child. *Pelak* v. *Karpa*, supra at 372. The primary purpose of the Connecticut paternity procedure is to ensure that the putative father provide the mother with assistance in carrying out her obligation of supporting the child. Id. Where the State of Connecticut has a financial interest in the support of the illegitimate child and the mother of the child fails to institute a paternity action, Connecticut law authorizes the State or the town to institute a paternity action in order to save the public from the burden of supporting an illegiti-

mate child. Id. at 372-73. Although not the primary purpose in a paternity action, the state's interest in saving the public from the burden of supporting an illegitimate child has been recognized as an important interest. Id. at 373. This is consistent with what was already pointed out by the Court in *Domonkos* v. *Rotundo*, supra, to wit: in Connecticut the community has a vital interest in determining the paternity of an illegitimate child.

With respect to all the benefits and rights for the illegitimate child heretofore discussed, it is thus clear that the State's interest in the determination of paternity of an illegitimate child is a vital interest in the sense of being the bridge which leads to the aforesaid benefits.

If the name of the father of the illegitimate child is not disclosed for the purposes of establishing paternity and support of such child, it is apparent that the mother of the illegitimate child, in most cases, is seriously impeded from carrying out her obligations in supporting her child. Under such circumstances, it is the welfare of the illegitimate child that is jeopardized. Such child's welfare is all the more jeopardized if the statute of limitations in paternity actions is allowed to run because the mother refuses to disclose the identity of the child's putative father.

It is apparent that the key as to obtaining most, if not all, of the above stated rights and benefits belonging to the illegitimate child is the identity of such child's father. With respect to the above stated rights and benefits that belong to the illegitimate child, it cannot be concluded that it was part of the comprehensive scheme of establishing the aforesaid rights and benefits to permit the mother of the illegitimate child to cut off or jeopardize such rights and benefits if the mother chooses not to identify the father of her illegitimate child. Section 52-440b seeks to further the state's interest in

the welfare of the illegitimate child by ensuring that the identity of the father of the illegitimate child is made known in order to keep open the bridge leading to the aforesaid rights and benefits belonging to the illegitimate child. In this connection, the State of Connecticut has an overwhelming interest, whether characterized as compelling or otherwise, in the passage and enforcement of Section 52-440b to withstand the constitutional challenge as asserted by the Appellants on the ground of an alleged violation of their personal privacy. The provisions of Section 52-440b are nothing more than a reasonable means of carrying out the state's interest in protecting the welfare of the illegitimate child. The reasonableness of the provisions of Section 52-440b becomes more evident when it is shown that the interest of the parent of the illegitimate child, as affected by Section 52-440b, fails to compare with the paramount interest in the welfare of the illegitimate child. For this, the Appellee turns to some of the evidence submitted by the Appellants in the case at bar.

By examining all of the affidavits executed by the Appellants and filed as evidence, appendix, pages 36-54, two conclusions are evident as follows:

(1) That the Appellants are primarily concerned with their own welfare and not primarily with the welfare of their children;

(2) That the Appellants, by their own conduct, have deprived and will continue to deprive their children of one or more of the aforesaid rights and benefits belonging to their children. As regards these two conclusions, the personal privacy of which the Appellants claimed to be entitled to is for the benefit of themselves more than it is for the welfare of their children. In deed, the affidavits of evidence point to the fact that the Appellants have created their own predicament and now attempt to alleviate their own plight at the

expense of one or more of the rights and benefits belonging to their children. These circumstances are but one of the many purposes of why Section 52-440b was enacted. What little harm, if any, the Appellants may suffer because of Section 52-440b is overshadowed by the loss of rights and benefits belonging to their children.

The personal privacy claimed by the Appellants amounts to nothing more than a claim that the Appellants should be shielded from the shocks, inconveniences and annoyances which members of our society in the nature of things must absorb without the right to redress. See *Davis* v. *General Finance & Thrift Corp.*, 57 S.E.2d 224, 227 (1950). If redress is needed, the Appellants are free to invoke other laws of the State, such as the criminal laws of this State. Viewed in this light, the Appellants' desire to keep secret the names of the fathers of the Appellants' children is not so fundamental and not so crucial, when compared to the paramount welfare of their children, as to require protection under the right of personal privacy. Consequently, the provisions of Section 52-440b, which seek to promote the paramount welfare of the illegitimate child, are not violative of any rights of personal privacy guaranteed under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.

The Appellants have emphasized as part of their claim that the enforcement of Section 52-440b results in additional strains in the family relationships within their respective homes. They also emphasize that the enforcement of Section 52-440b may alter any existing relationship with the fathers of their children. This position gives little recognition to the mental stress, anguish and injury suffered by the illegitimate child who is denied the identity of his father. E.g. see *Does The Bastard Have A Legitimate Complaint?*, 22 University of Miami Law Review 884 (1968); *Zepeda* v. *Zepeda*, 190 N.E.2d 849, 857 (1963).

It has been pointed out that the right of personal privacy has some extension to activities relating to family relationships. But such a right as regards family relationships also has its limitations. *Prince* v. *Massachusetts*, 321 U.S. 158, 166-167. As to such limitations, the Court in *Prince* v. *Massachusetts*, supra, stated the following:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U.S. 145; *Davis* v. *Beason*, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulation or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . ."

Keeping in mind what was above stated by the Court in *Prince* v. *Massachusetts*, it should be recalled that in *Roe* v. *Wade*, supra, the Court restricted the right of privacy in the abortion situation by permitting the state to regulate abortions on the basis that the state has an interest in promoting the potentiality of human life after viability. In view of these two recognized restrictions to the right of privacy in the areas of abortions and family relationships as aforesaid, Section 52-440b cannot be regarded as an unreasonable limitation to the Appellants' personal privacy when all that is being asked for is the disclosure of the identity of the fathers of the Appellants' children, which serves in the best interests of such children.

The police power of the state has been recognized as a legal limitation on the right of privacy. *Walton* v. *Atlanta*, (1949, D.C. Ga.) 89 F.Supp. 309, 314, mod. (CA 5th) 180 F. 2d 143, aff'd. on reh. 181 F.2d 693; cf. *State ex rel. Marity* v. *Tyndall*, 74 N.E. 2d 914, app. dismd., 333 U.S. 834, reh. den., 333 U.S. 858. It has been held that the right of privacy is not automatically superior to the rights of the public and such a right claimed by an individual should be viewed in the light of such individual's relation to the community. *McGovern* v. *Van Riper*, 54 A.2d 469, 471 (N.J. 1947).

Because of the Appellants' past conduct, the Appellants have created a situation where the innocent illegitimate child is made a victim. Such child, nevertheless, is expected to function in the community like any other child. Because of this, the Appellants' personal privacy must be viewed in the light of the illegitimate child's functioning in the community. In terms of the needs for the illegitimate child's functioning in the community, the regulations prescribed by Section 52-440b cannot be regarded as unreasonable and should not be made to yield to the personal privacy claimed by the Appellants.

III. Section 52-440b of the General Statutes of Connecticut, Revision of 1958, Does Not Violate Due Process of Law Standards.

The object of Section 52-440b is to obtain the name of the father of the child in question by compelling the mother, if necessary, to disclose such name for the purpose of determining the paternity of the child. Such a process falls within the broad scope of the government's power to compel testimony in court, before grand juries and other governmental agencies. *Kastigar* v. *United States*, 406 U.S. 441, 443 (1972). The lower court, *Doe* v. *Norton*, supra at 75, fully delineated the rational on which the government's power to compel testimony is based. The power to compel testimony is not absolute.

Kastigar v. *United States*, supra. There are a number of exemptions from the testimonial duty. See *Blair* v. *United States*, 250 U.S. 273; 8 *Wigmore*, section 2197. The most important exemption from the testimonial duty is found in the United States Constitution, the Fifth Amendment privilege against compulsory self-incrimination. *Kastigar* v. *United States*, supra. As Section 52-440b provides immunity to satisfy the Fifth Amendment privilege and as the lower court in *Doe* v. *Norton*, supra at 76 so recognizes, the Appellants do not assert a violation of the Fifth Amendment privilege under this issue. Nor do the Appellants under this issue assert a violation of any other recognized privilege against testifying. The Appellants' claim that Section 52-440b violates the Due Process clause, in so far as the substantive law is concerned, was discussed earlier in this brief.

What the Appellants contend as a further violation of due process of law is essentially four fold as follows: one Section 52-440b creates an irrebuttable presumption; two, Section 52-440b fails to provide for an "individualized hearing" to determine whether a proper purpose is advanced by the regulation of the Appellants' situation; three, Section 52-440b fails to provide standards for the courts to use to narrow the statute's application; four, Section 52-440b is far too broad.

This contention by the Appellants was basically answered by the lower court, *Doe* v. *Norton*, supra at 74, n. 14, and need not be reiterated here. It should be emphasized that the lower court found as completely groundless the Appellants' argument that Section 52-440b imposed an irrebuttable presumption on the Appellants. The lower court further considered at length the question of an evidentiary privilege and this also need not be reiterated here. Whether Section 52-440b lacks standards or is too broad and whether the statute requires an "individualized hearing" as the Appellants suggest will be discussed next.

A. The statute is not too broad and contains sufficient standards:

Section 52-440b restricts severely whom is to disclose and to whom the disclosure will be made. If ultimately in the proceedings under Section 52-440b a judicial tribunal is called upon to exercise a judicial function, it does not matter that the proceedings were begun by an official in the exercise of an administrative capacity. See *McCarthy* v. *Clancy*, 110 Conn. 482, 495 (1930). Section 52-440b further specifies under what particular circumstances the witness is to disclose. This statute further restricts severely the subject matter, i.e., if the mother "fails or refuses to disclose the name of the putative father of such child under oath. . . ." *Section* 52-440b *of the General Statutes of Connecticut, Revision of* 1958. This latter point would leave to the Connecticut Circuit Court to make inquiry into the following: who is demanding disclosure and under what circumstances; whether there was a refusal to be sworn or to disclose; whether the refusal was justified in law; whether the question the witness refused to answer was a proper question; whether the "proper question" was reasonably related to the subject of inquiry. See generally, *McCarthy* v. *Clancy*, supra at 496. After determining these matters, the Connecticut Circuit Court has the obligation to hear the witness and consider any defense the witness might offer. See *McCarthy* v. *Clancy*, supra.

In connection with the court's obligation to hear the witness and consider any defense the witness might offer, due process of law also protects against the use of excessive means to obtain any evidence. *United States* v. *Doe*, 405 F.2d 436, 438 (2d Cir., 1968) (contempt proceedings). This would also destroy the Appellants' argument that Section 52-440b also violates the Fourth Amendment of the United States Constitution in that Section 52-440b is an intrusion into a private area without prior due process, for the purpose of seizing evidence for litigation. Also, due process of law further requires the court under Section 52-440b to allow the witness the opportunity to present evidence showing why he should not be held in contempt. See *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63, 71 (1973).

Section 52-440b further provides a legal process, to wit: the mother may be "cited to appear before any judge of the circuit court and compelled to disclose the name of the putative father under oath. . . ." The word "cite" has been defined as follows:

> "To summon; to command the presence of a person; to notify a person of legal proceedings against him and require his appearance thereto." *Black's Law Dictionary*, 310 (4th ed. 1951).

With regard to a fair opportunity for the witness to protect his rights and also to protect the rights of the public in the discovery, it is apparent that to summon by citation satisfies the standards of due process as to the legal means for notifying the witness under Section 52-440b of the nature of the proceedings to which he is entitled, so long as it also provides reasonable information as to the purpose of the inquiry. *McCarthy* v. *Clancy*, supra at 502.

In Connecticut, punishment for contempt committed in the presence of the court is statutorily regulated. *Section* 51-33 *of the General Statutes of Connecticut, Revision of* 1958. Where process is required to bring the offender of the contempt proceedings into court, the contempt is ascertained and punished according to common law. *Huntington* v. *McMahon*, 48 Conn. 174, 196 (1880). As Section 52-440b provides that a mother *may* be cited to appear in court for her refusal to disclose, it is apparent that the common law standards regulating contempt would also apply to a contempt arising out of Section 52-440b.

In Connecticut, a judgment of contempt is a final order which may be reviewable by the State Supreme Court. *Stoner* v. *Stoner*, 163 Conn. 345, 359 (1972); *State* v. *Jackson*, 147 Conn. 167, 170 (1960). Such a review by the State Supreme Court embraces the questions of jurisdiction "such as whether the court had authority to impose the punishment inflicted and whether the act or acts for which the penalty was imposed could constitute a contempt." *Goodhart* v. *State*, 84 Conn. 60, 63 (1911); *State* v. *Jackson*, supra at 170.

When mothers under Section 52-440b have appeared in court and have been heard in accordance with the statutory standards, the common law standards, and the due process standards and been found to have failed in their duty under Section 52-440b, their fines or their commitment to jail are not in violation of due process of law guaranteed by the Federal and State Constitutions.

In addition to the above noted standards, the language used in Section 52-440b allows the Connecticut Circuit Court to exercise its sound judicial discretion as to whether in a particular case non-disclosure warrants a finding of contempt or the imposition of a penalty. *Doe* v. *Norton*, supra at 74, n. 14.

The Appellants further urge that commitment under Section 52-440b raises a question as to due process of law. When a similar argument was made to the Connecticut Supreme Court, the Connecticut Supreme Court stated the following:

> "Punishment for contempt by a court, or other tribunal duly authorized, is 'due process of law' within the meaning of the constitution. The right and duty of the state to protect its jurisdiction and dignity by punishing for contempt, in proper cases, through its officers, is the sacred right of self-defense." *In re Clayton*, 59 Conn. 510, 520 (1890).

From what was stated by the court *In re Clayton*, supra, as above quoted, in no stretch of the imagination can a commitment under Section 52-440b within the proper safeguards constitute, as the Appellants suggest, cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States.

B. *"Individualized Hearing":*

When the Appellants claim that due process requires an "individualized hearing" as to disclosing the name of the putative father under Section 52-440b, it is not known whether such characterization by the Appellants refer to a trial on the merits. As regards contempt proceedings under Section 52-440b, it should be pointed out that the Appellants are not on trial for their conduct. Nor are they in jeopardy and exposed to any detriment provided they answer the "proper question". The Appellants are witnesses for the purpose of disclosing the names of the putative fathers of the children in question. In a criminal contempt, the proceedings are criminal in nature but do not constitute a criminal prosecution. *State* v. *Jackson*, supra at 169. Similarly, it is submitted that a civil contempt cannot be held tantamount to a civil prosecution which requires a trial on the merits for the parties. Whether under Section 52-440b contempt proceedings are classified as criminal or civil in nature, a hearing on the scale of a trial is not necessarily required by due process of law.

It is recognized that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest'. *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1971). The Court in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, at 895 (1961) stated the following:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . .

> . . . what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action."

The hearing that is provided under Section 52-440b as regards any contempt proceedings is a well-designed hearing procedure in that on one hand it takes into consideration the interest of the State, as well as the interest of private citizens, while on the other hand it takes into consideration the interest of the mothers, such as the Appellants. In such a process, none of the due process standards are excluded or absent as heretofore argued.

The Appellants further urge that Connecticut fails to provide for the appointment of counsel to mothers facing citations under Section 52-440b. It is submitted that the statute and the court exercising its function under the statute do not preclude such mothers from having counsel. Nor is it true as the Appellants suggest that the Connecticut Circuit Court lacks power to appoint counsel for indigent mothers merely because *Section 54-81a of the General Statutes of Connecticut, Revision of* 1958, applies to criminal matters.

The Appellants make the claim that the First Amendment of the United States Constitution incorporates a right to prevent divulgences of some types of private information. They assert that the right to associate freely implies some right to prevent the public disclosure of that association where such disclosure might impair the right.

The First Amendment by way of the Fourteenth Amendment does not prohibit, but rather limits the power of the States to interfere with freedom of speech, with freedom of inquiry, and with freedom of association. Inquiry by the government must be related to and further a legitimate governmental task. *Watkins* v. *United States*, 354 U.S. 178, 187. In addition, the scope of the inquiry must not be unlimited. *Shelton* v. *Tucker*, 364 U.S. 479, 488. As heretofore pointed out, the inquiry made under Section 52-440b is related to and does further a legitimate governmental interest under the guidance of statutory, common law, and due process standards.

With regard to the right of inquiry as related to the right of association, the Supreme Court of the United States demands that the State demonstrate an interest in obtaining the disclosure it seeks from a person that is sufficient to justify any deterrent effect that the disclosure may have on such person's exercise of his constitutionally protected right of association *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463. The interest of the state in obtaining the disclosure must be so cogent as to justify the substantial abridgment of associational freedom which such disclosure will effect. *Bates* v. *Little Rock*, 361 U.S. 516, 524. If the inquiry is a significant encroachment upon personal liberty, a showing of subordinating interest which is compelling must be made by the State. Id. As previously argued by the Appellee, a desire on the part of any of Appellants to keep secret the name of her child's father is not so fundamental or implicit in the concept of ordered liberty as to require constitutional protection. Nor is there under Section 52-440b any encroachment by the state upon any personal liberty of any Appellant. Even if any Appellant's desire for secrecy is fundamental or even if there is some encroachment upon any Appellant's personal liberty, the State of Connecticut's interest in seeking the disclosure under Section 52-440b is overwhelming as to the following: the support and welfare of the child; the support and welfare of the child's mother; the welfare of the community in relation to the child and its mother; in the reimbursement of welfare assistance. Such interest is compelling enough to withstand any of the constitutional objections to Section 52-440b raised by the Appellants, including any objection under the First Amendment.

The Appellants further claim that the First Amendment right to petition for redress of grievances includes the right to have access to courts and as such implies a corresponding right not to resort to Courts. In relation to this claim, the Appellants assert that Section 52-440b forces the Appellants to institute and prosecute paternity actions.

It is to be noted that the instituting and prosecuting of paternity actions arising out of Section 52-440b is not compulsory. As may be recalled, the lower Court noted that Section 52-440b contains language which permits the Connecticut Circuit Courts to exercise sound judicial discretion in administering Section 52-440b. This includes compelling the institution of any paternity action by a mother who fails or refuses to bring a paternity action within the terms of Section 52-440b. Thus, the mandatory or compulsory problem, as presented in relation to the school resolution adopted by the Board of Education in *Board of Education* v. *Barnette*, 319 U.S. 624, is not present in the case at bar.

In view of the fact that the Connecticut Circuit Court may exercise sound judicial discretion under Section 52-440b, we must not be so naive as to believe that after proper inquiry a Connecticut Circuit Court under Section 52-440b would, in the practical sense, compel a mother to institute and prosecute a paternity action if the mother is adamant in and committed to her belief against bringing a paternity action. Her reluctant conduct in bringing a paternity action may have a bearing as to the evidence placed before a jury. In the exercise of sound judicial discretion under such circumstances, it is apparent that it would be more practical for the Connecticut Circuit Court to recommend after disclosure is made that the institution and prosecution of the paternity action be made by the State or town pursuant to *Section 52-440a of the General Statutes of Connecticut, Revision of* 1958, wherein the mother merely may be compelled to act as a witness. The provision of

Section 52-440b which provides that the court may compel a mother to institute a paternity action must be construed as merely an affirmation by the Connecticut legislature to have the child's interest protected and to have the State's or town's claim for reimbursement of welfare assistance subrogated to the mother's right of claim against the putative father.

We also must not forget that there are mothers who may appear before the Court under Section 52-440b because they are undecided for a variety of reasons as to whether initiating paternity actions is the right thing to do. In the exercise of sound judicial discretion, the Connecticut Circuit Court might conclude that it would be in the best interest of the child, or in the best interest of all, if a paternity action was instituted and may convince such mothers to voluntarily institute the paternity actions. If the Connecticut Circuit Court concludes that it is not in the best interest of the child to have a paternity action instituted, the contempt provisions of Section 52-440b are not mandatory upon the court.

It should be also pointed out that the power to hold mothers in contempt under Section 52-440b for their failure or refusal to institute paternity actions is not compulsory. However, suppose that a Connecticut Circuit Court does hold a particular mother in contempt under Section 52-440b for her refusal to institute a paternity action. Without more, are we to assume that the Court is automatically without a basis or valid purpose in finding the mother in contempt? Are not the acts upon which the contempt is founded reviewable by a higher state tribunal? Are not the contempt proceedings subject to the standards of due process?

In considering the foregoing, Section 52-440b does not provide a mandatory procedure for contempt. Nor does Section 52-440b provide a process whereby it is mandatory upon mothers to take affirmative action to institute paternity ac-

tions in contravention of any First Amendment right. Whatever is required of mothers under Section 52-440b does not force them to adopt beliefs or attitudes not of their own choosing. What Section 52-440b does require is that mothers perform a duty that is useful and necessary to the community.

IV. Section 52-440b Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

A. *The standard to which the Connecticut Statute must adhere:*

Elementary to any discussion of whether a challenged statute violates a person's right to equal protection of the United States Constitution must be a determination of precisely what standard it is that the statute may be said to violate. As has been generally accepted, state statutes are entitled to a presumption of validity and will be closey scrutinized only where there is a claim that fundamental constitutional rights have been violated or where it appears that they are based upon a suspect classification such as race or wealth. *San Antonio Independent School District* v. *Rodriguez* 411 U.S. 1 (1973); *McDonald et al* v. *Board of Election Commissioners of Chicago* 394 U.S. 802 (1968). If no suspect classification or fundamental right is involved the traditional equal protection standard holds that a statute may be declared unconstitutional as violating Equal Protection only if it bears no rational relationship to a legitimate state purpose. *Frontiero* v. *Richardson* 411 U.S. 677 (1973); *McGowan* v. *Maryland* 366 U.S. 420 (1961).

Recently, a third, intermediate standard has been urged as an addition to the traditional two-tiered standard. Particularly in the Second Circuit this standard, described as "a more graduated sliding-scale test" has gained some adherents. In this regard see *Aguayo* v. *Richardson* 473 F.2d 1090 (U.S.C. of Apps. 2nd Cir., 1973) and *City of New York* v. *Richardson* 473 F.2d, 923 (U.S.C. of Apps. 2nd Cir., 1973). However, even in this Circuit the supposed new standard has been openly questioned. As the Court put it in *Henry* v. *White* 359 F.Sup. 969, 971 (D. Conn., 1973):

> "Within the Second Circuit recent cases have suggested that the appropriate standard is somewhat higher than the traditional relationship test . . . While some Supreme Court decisions offer hints in this direction in some contexts, more recent cases suggest that the rational relationship test is alive and well, *San Antonio Independent School District* v. *Rodriguez*, supra; *McGinnis* v. *Royster*, v. *Royster*, 410 U.S. 263 (1973)."

In *Boraas* v. *Belle Terre*, 476 F.2d 806 (2d. Cir. 1973) the Circuit Court clearly set up a new standard to fall between the two traditional standards. However, this decision was reversed by the Supreme Court in *Boraas* v. *Belle Terre* 42 U.S.L.W. 4475 (April 11, 1974). Rather than using a "sliding-scale standard" under which the more valuable the nature of the right affected, the more intense the judicial scrutiny required and the more rational must be the means to achieve the objective; the Supreme Court appears to have hewn close to the traditional rational relationship standard in overturning the Circuit Court decision in *Borras*.

It is submitted that Section 52-440b of the Connecticut General Statutes in any event is both rationally related to a valid public purpose *and* necessary to the achievement of a compelling state interest and therefore capable of passing the strictest judicial scrutiny (although this is not essential) as neither a suspect classification nor a fundamental right is involved in this case. The statute is thus able to pass either the traditional rational relationship test or meet a stricter new standard.

The objections to Section 52-440b voiced by the Appellants could in truth better be urged at a session of the Connecticut Legislature than in front of this Court. See *Dandridge* v. *Williams* 397 U.S. 471, 503 (1970) where the Court stated:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. *Goldberg* v. *Kelly* 397 U.S. 254 (1970). But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

Appellants' arguments are basically policy arguments and should be heard in a legislative, not judicial, forum; there has been no denial of equal protection shown here.

B. *No Fundamental Constitutionally-Protected Rights have been Violated by Section* 52-440b

The Appellants' claim that the law in question violates their fundamental right to privacy is further discussed in the section of this brief dealing with the constitutional right to privacy. However, it appears that some comment upon this claim is relevant here. As the Court stated in *Roe* v. *Wade* 35 L.Ed. 2d 147, 180 (1973):

> "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation is therefore inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce, and Meyer were respectively concerned. . . . The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."

The mother of an illegitimate child similarly "cannot be isolated in her privacy." She is either a married woman some of whose children have been illegitimated by a dissolution of marriage or other judicial proceeding in which these children have been found "not to be issue of the marriage" which finding is a matter of public record or she is a single woman obviously pregnant with an illegitimate child. Thus, the fact of the child's illegitimacy must certainly be known among a number of the mother's associates and friends. Even if, as has been urged, we accept the fact that a number of unwed mothers go elsewhere to bear their children, their arrival back in town with an infant in tow is doubtless all the advertisement needed to brand the child as illegitimate. And, further, in the case of those families on AFDC the mother has informed the Welfare Department of the child's illegitimacy. Thus, without any action under Section 52-440b at all the privacy of the mother of an illegitimate child has already been invaded. Because of the simple but obvious situation resulting from her own actions, she has already been subjected to embarrassment and her child stigmatized as illegitimate. About the only aspect of this condition which does not naturally become common knowledge is the identity of the child's father.

As the damage to the mother's and the child's reputation has already been done there can be little more violation of privacy involved in requiring the mother to name the child's father; and surely whatever invasion does result from such a

requirement cannot be said to outweigh the benefits, both financial and psychological which flow to the child as a result of the establishment of his paternity and the financial and social benefits to the public in the case of an illegitimate child on welfare.

Furthermore, to say, as this Court did in *Roe* v. *Wade*, supra at 197-177 that the right to privacy "has some extension to activities relating to" marriage, procreation, contraception, family relationships, and child rearing and education does not mean and cannot fairly be construed to mean, as the Appellants in this case would have us believe, that every activity which could conceivably be related to any of the aforementioned areas is automatically entitled to be included in that zone of privacy protected under the Constitution. The type of rights that may be considered so "fundamental" as to be guaranteed under the Constitution has been pointed out in a number of cases.

The right to determine what individual shall be one's marriage partner is protected and may not be restricted because of race. *Loving* v. *Virginia* 388 U.S. 1, 12 (1967). Also the right to determine whether one will or will not bear children through the use of birth control has been protected in *Griswold v. Connecticut*, supra. On the other hand the right to determine whether one will or will not bear children through the use of abortion has been held to be not an absolute constitutional right and the States may impose certain restrictions upon it such as requiring that the woman's physician "in his best clinical judgment recommend it as necessary", or, after the first trimester of pregnancy, requiring that an abortion be done in a properly equipped facility by a licensed operative; finally, in the last trimester the state may entirely prohibit an abortion. *Doe* v. *Bolton* 410 U.S. 179 (1973); *Roe* v. *Wade*, supra at 179. Mention of this point is made to show that even in the most private of the

constitutionally protected zones of privacy the Court has not held that state regulation has absolutely no place. For example probably very few people would attempt to read the Court's opinion in *Loving* v. *Virginia*, supra, as automatically rendering unconstitutional all state statutes against incestuous marriages, yet such laws do limit the freedom an individual has in determining whom he will marry.

This Court has long been engaged in a process of weighing and balancing the interests which the state is trying to protect against those of the individual claiming a right to privacy; often a compromise between these two competing interests has been struck as in *Roe* v. *Wade*, supra. Even where fundamental rights are concerned the state has been permitted to regulate when this is necessary for the individual's own good — as regulations involving the mother's health in the second trimester of pregnancy where an abortion is involved — or where the opposing rights of another individual may be involved — for example, those of the fetus where the mother desires an abortion in the last trimester of pregnancy. Along these lines see also *Prince* v. *Massachusetts*, supra and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Finally, even if the right of privacy advanced by Appellants here could conceivably be considered fundamental, it is submitted that the interests represented by the state in this case — those of the illegitimate child to support by his father and those of the public in promoting and protecting the relationship and duties of parent and child as well as to reimbursement from legally liable relatives for monies expended to support the child are sufficiently compelling to justify state intervention in this instance. If an unborn fetus at any time can be said to have a right which is so compelling as to outweigh its mother's fundamental right to determine whether she will or will not bear a child, *Roe* v. *Wade*, supra, then it must be admitted that the right of a child who has already

been born to support from its parent can hardly be considered to be less compelling. And this right becomes even more important when it is recalled that there is a three year statute of limitations for paternity actions in Connecticut, Connecticut General Statutes Section 52-435a, and beyond this point the child cannot sue his father for support if his mother has not done so for him.

Nor is the mother's fundamental Fifth Amendment right not to incriminate herself an issue here. The Connecticut legislature has by statute provided immunity from criminal prosecution to both the mother and the putative father of an illegitimate child for any criminal act about which either gives testimony during paternity proceedings or for any statement made prior to those proceedings which relates to the issue of paternity. Connecticut General Statutes Section 52-435(b) as amended by Public Act 432 Section 2 (1971) and Connecticut General Statutes Section 52-435c as amended by Public Act 439 Section 1 (1971).

The government's power to compel testimony from unwilling persons even though that testimony may be embarrassing or tend to disparage their character has been clearly established. The public has a right to every one's evidence and the citizen has the duty to testify. *Kastigar* v. *United States*, supra; *Branzburg v. Hayes*, 408 U.S. 665 (1972). Even the marital privilege not to testify against one's spouse (and such a privilege can hardly be claimed in the case of mere paramours) has been held to be merely a legislatively-created privilege and not a right which is "fundamental" in the sense that it is among the rights and liberties protected by the Constitution. *Branzberg* v. *Hayes*, supra; *Wyatt* v. *United States* 362 U.S. 525 (1960).

C . *The Classification Created by Section 52-440b is Rational, Valid and Does Not Create Invidious Discrimination.*

In *Rinaldi* v. *Yeager* 384 U.S. 305 (1966) the Court discussed the Equal Protection requirements governing legislative line-drawing at page 309:

> "The Equal Protection Clause requires more of a state than non-discriminatory application within the class it establishes. *McLaughlin* v. *Florida* 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tigner* v. *Texas* 310 U.S. 141,147 (1940). Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' "

1. The Statute does not invidiously discriminate against illegitimates.

Since colonial times it has been the policy of Connecticut to require a father to support his illegitimate child. This policy is part of a general statutory scheme of this state requiring that "when a person is unable to support himself and has a husband or wife, father or mother, or children who are able to provide such support, it shall be provided by them." *State* v. *Wolfe*, supra at 202. In this regard see Connecticut General Statutes Sections 17-320, 52-442, and 52-442a. Should any of the class of persons entitled to support be the recipient of public assistance the State of Connecticut may

institute legal procedures against that person's legally liable relatives to obtain an order for payment of support to the state; in this manner at least a portion of the public funds expended may be recouped. Connecticut General Statutes Section 17-324. The statute under attack here fits into this general scheme by attempting to provide the information and testimony necessary to establish paternity (the father's identity) so that a paternity action can be maintained and, if that suit is successful, a support order made. However, Connecticut has long been concerned with more than the mere paternal support of an illegitimate child and early rejected the Common Law doctrine of nullius filius. *Dickinson's Appeal*, supra.

A growing concern for the status of the illegitimate child and an increasing interest in placing him on an equal footing with legitimates can be discerned in several recent Supreme Court decisions. *Levy* v. *Louisiana*, supra, declared unconstitutional a state statute which did not permit illegitimate children who had been dependent upon their mother to bring an action for her wrongful death. Similarly, in *Glona* v. *American Guarantee and Liability Insurance Co.*, supra, the Court struck down the Louisiana statute which prevented a mother from recovering for the wrongful death of her illegitimate son. Again in *Weber* v. *Ætna Casualty and Surety Co.*, supra, the Court held unconstitutional a Louisiana law which placed unacknowledged illegitimate children in an inferior position in claiming Workmen's Compensation after their father on whom they had been dependent was killed. As the Court stated in *Weber* at page 172, "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . ."

In *New Jersey Welfare Rights Organization* v. *Cahill*, 36 L.Ed.2d 543 (1973) the Court declared ". . . there can be no

doubt that the benefits extended under the challenged program [Assistance to familiies of the Working Poor Program] are as *indispensable* to the health and well-being of illegitimate children as to those who are legitimate." And again in *Gomez* v. *Perez*, 409 U.S. 535, 537-8 (1973) this court stated:

> "We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

Thus while the Court has not specifically declared illegitimacy an inherently suspect classification requiring strict scrutiny it has clearly held recently that a classification of illegitimates which operates to their disadvantage can be justified only by showing that the state interest so furthered is substantial. However, the statute currently at issue operates not to the disadvantage but to the advantage of illegitimates by assisting in establishing their paternity and establishing for them the right to paternal support — advantages of which their mothers would deprive them. As Judge Blumenfeld declared in his opinion below at Appendix, p. 147: "Indeed if the legislature were to enact a law protecting the 'right' of unwed mothers to exclude their children from the benefit of parental support, it would be struck down."

In any case as the Court stated in *Labine* v. *Vincent*, 401 U.S. 532, 536 (1971) in upholding the Louisiana intestate succession scheme which placed illegitimate children in an inferior position to legitimate children and other relatives: "*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring." and further on in *Labine* at pp. 293-294:

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. . . . But the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that state. Absent a specific guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws."

The situation is essentially the same in the present case as in *Labine*. Here the Connecticut legislature has made a determination that it is in the best interest of illegitimate children and of the public to promote and protect the relationship and duties of parent and child as well as to be reimbursed by legally liable relatives for welfare money spent to support the child. If the appellants disagree with the judgment of the Connecticut legislature in these matters that is the forum to which they should turn for reform. The children's attorneys in their brief state at p. 26, without any substantiating data: "Most children are more likely to be harmed than helped by enforcement of the statute against their mothers." However, this is not the view of the Connecticut legislature; nor is this, apparently, the view of the vast majority of mothers of unwed children. (See Deposition of Joseph Mancini, Appendix at pp. 116, 110 and 108 where Mr. Mancini, Welfare Investigator, State of Connecticut, indicated that out of 150 to 200 cases per month over a period

of several months only six mothers were cited to court for refusing to name the putative fathers of their illegitimate children.)

Maintaining a mother-child relationship free of stress, again is not a constitutionally protected right; it truly appears that Appellants should bring whatever psychiatric information they have to show that it is harmful to an illegitimate child to establish his paternity and obtain paternal support for him to the legislature, not the Courts.

Finally, naming the putative father is not a condition of eligibility for AFDC for either child or mother. The only sanctions imposed are those against the mother for failure to testify and she can purge herself of contempt and return to her children at any time by naming the putative father.

As has been pointed out the classification of illegitimates upon which this statute is based does not invidiously discriminate against such children and, therefore, does not require strict judicial scrutiny of the classification.

2. The statute does not violate the Fourteenth Amendment because of a "suspect classification" based upon sex.

While the Supreme Court has certainly viewed classifications based upon sex with dislike, it appears that the majority has not yet placed sex upon the list of those suspect classifications which automatically require strict scrutiny. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) Consequently, the appropriate test would appear to be the "rational relationship" standard as applied in *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971):

". . . this Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. . . .

> The Equal Protection Clause of that Amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)"

This same standard has recently been reiterated by the Court in the case of *Johnson* v. *Robison*, 42 U.S.L.W. 4313, 4317 (March 4, 1974).

In any case, the Connecticut Legislature has attempted specifically to draw its statutes including those dealing with paternity actions in such a manner that they will not discriminate on the basis of sex. See Connecticut General Assembly - House Proceedings, 1971, Vol. 14, pt. 8, May 21, 1971, p. 3521-3522.

> "John A. Carrozzella, 81st Dist.: Mr. Speaker, what this does is amends the paternity act to provide a mother, or first of all, they treated the father with immunity for any statements made prior to proceedings or during the proceedings. It gives the same immunity to the mother. Under present law she only has immunity while testifying, now she will have the immunity for statements made prior to the proceedings, too. In addition, it provides that the written sworn affirmation of maternity must be executed by the mother as well as the father when acknowledgment of paternity is filed in the Circuit Court so as to have the effect of a judgment."

Regardless of any pronouncements which may be made by this Court or even a Constitutional Amendment regarding

the equality of the sexes, one fact remains absolutely unchangeable — men do not bear children. Under Connecticut General Statute Section 7-50 the name of the putative father of an illegitimate child may not even be entered on the birth records of the child without the written consent of the putative father. Thus, the name of a putative father is information possessed only by the mother of an illegitimate child and until that specific piece of information is available no paternity action can even be commenced against a putative father which would permit the subpoenaeing of the mother to give testimony regarding him in order to establish paternity; one cannot commence a suit against an unknown person. Consequently, Section 52-440b provides for this situation by permitting the state, town or guardian ad litem to obtain the vital piece of information which is needed in order to bring a paternity suit, establish the child's parentage, and obtain paternal support for him — the name of the putative father.

On the other hand, the names of the mother of an illegitimate child and of the parents of a legitimate child are virtually always known or available through the registrar of vital statistics or other public records including those of other states. (The state department of health requires each birth certificate to contain the name of the child's mother and, if she is married to the child's father, his name.) Connecticut General Statutes Sections 7-48 and 7-56. Thus in the case of other parents than putative fathers at least their names can fairly easily be established so that an investigation may be conducted to determine their whereabouts and an action for support commenced against them. In addition no further action is required against them as it is against putative fathers to establish liability. However, in the case of putative fathers whom the mothers refuse to name the state, town or guardian is left without even a starting point for an investigation.

As has been discussed previously, it is the policy of the State of Connecticut to require parents to support their minor children and, if the children are on public assistance, for the state to pursue legally liable relatives and obtain orders against them for the support of their minor children. Should any witness in such an action refuse to testify or to answer any proper question he can be found in contempt and committed by the court as has long been permitted generally in judicial proceedings. *McCarthy* v. *Clancy*, supra at 497, and cases there cited. Further, after a support order has entered, any legally liable relative who fails to meet such an order may be found in contempt and imprisoned. Connecticut General Statutes Section 17-324, See also Connecticut General Statutes Section 53-304.

It is further argued by Appellants that the State cannot compel the mother of an illegitimate child to start paternity proceedings as it does not force any other class to take such action. Again the uniqueness of the situation must be remembered. The mother is virtually the only person knowing the name of the father or possessing the information to establish that he is indeed the father.

While Section 52-440a does permit the state or the town if either is "interested in the support of a child born out-of-wedlock" to institute a paternity proceeding if the mother fails to do so and may subpoena the mother to testify, no such provision is made in the case of children not receiving public assistance. Thus, the child's only recourse to establish his paternity through a guardian or guardian ad litem is to request the court to compel his mother to undertake paternity proceedings or be held in contempt under Section 52-440b. Again the court is granted discretion and one may assume that it would only require the mother to institute suit if the circumstances warranted it and would probably do so only in a case where no one else was empowered to start paternity proceedings. To date it does not appear that any Circuit Court

judge has compelled any woman to institute paternity proceedings or held her in contempt for failure to do so.

Thus it is clear that Connecticut provides for equal enforcement of its policy of requiring both parents to support a child as to all parents. Section 52-440b is part of this scheme of enforcement and applies to mothers of illegitimates alone because only they have the information which is necessary to commence any type of paternity proceedings. As to other parents information concerning their identity is at least available.

Quite simply, Section 52-440b exists because that is the only way possible in some cases to obtain the information and testimony necessary to establish the paternity of and support for illegitimate children — the establishment of which matters the Connecticut Legislature has determined to be in the best interest both of the illegitimate children involved and the general public. To complain because others are not subject to Section 52-440b is to complain because apples are not oranges; in other cases the information sought here is easily available. The Legislature has provided a narrowly drawn statute to apply to a unique situation — a statute which is admirably suited to obtaining information and testimony essential to the successful pursuit of compelling state interest — establishing the paternity of illegitimates, obtaining paternal support for them and recouping money expended for their support from public funds — and which creates a reasonable classification — mothers of illegitimates who are the only persons possessed of the required information regarding the identity of putative fathers. Such information, as has been indicated, is already available regarding other parents and thus resort to such a procedure for the simple purpose of gaining information in their cases is unnecessary because in their case no further action such as a paternity proceeding, is necessary to establish their liability.

3. The Statute does not create a suspect classification on the basis of poverty.

It must be admitted by all concerned that the position that the establishment of paternity and the subsequent entitlement to support along with the other benefits which result is harmful to an illegitimate child is surely a novel doctrine. However, on the basis of a deposition by one psychiatrist and an affidavit by one psychologist the Appellants have set themselves up as experts in the field and have determined to set about to overthrow the common experience of centuries, of the Connecticut legislature, and of most mothers of illegitimate children (see Appendix, Deposition of Joseph Mancini, pp. 112-116) that the establishment of paternity and of paternal support is in the child's best interests. In fact, the Supreme Court seems to subscribe to the view that establishing the right to financial support is crucial to the best interests of the illegitimate child. *New Jersey Welfare Rights Organization* v. *Cahill*, supra; *Weber* v. *Aetna Casualty and Surety Co.*, supra; *Levy* v. *Louisiana*, supra; *Glona* v. *American Guarantee and Liability Insurance Co.*, supra.

The statute itself reflects this view that it is in the best interests of the child and of the public to establish paternity and support by permitting compelled disclosure of the name of the putative father from both the unwed mother of an illegitimate child and from the mother of any child born to a married woman during marriage which child is later found not to be the issue of the marriage "to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child." Thus there is a duty of disclosure placed upon both mothers of illegitimate children who receive welfare and those who do not. Consequently there is no discrimination against those who are poor.

Appellants argue that a guardian or guardian ad litem is likely to agree with their feeling that establishing paternity is harmful to an illegitimate child and that they may not therefore force disclosure of the putative father's name and that because of this the statute is less likely to be enforced against mothers of illegitimates who are not on welfare than against those who do receive public assistance. However, the fact that guardians may be less diligent in pursuing the establishment of paternity and support than the Welfare Commissioner is not sufficient to invalidate the statute. And in this regard it must be remembered that such an idea is merely unsupported speculation on the part of the Appellants. For, as was stated by the Court in *Buck* v. *Bell*, supra at 208; "The law does all that is needed when it does all that it can; indicates a policy, applies it to all within the law and seeks to bring within the lines all similarly situated so far and so fast as its means will allow."

Finally, as was pointed out by Judge Blumenfeld in his opinion below (see Appendix p. 139) and as has been recognized by the Judges of the Connecticut Circuit Court (see the transcripts of various cases filed with the several briefs: Appendix of Brief Amici Curiae, pp. 16a-17a and 24a-25a; *Norton* v. *Larracuente*, No. CV2-738-94960 Second Circuit Court Nov. 23, 1973 [case X of Appellant's Appendix]) the statute grants the Judges discretion as to whether to hold in contempt the mother who refuses to disclose the putative father's name. (See the wording of Section 440b which provides that the mother "*may* be found to be in contempt of said court and *may* be fined not more than two hundred dollars or imprisoned not more than one year or both.")

There is thus, no class limited to the poor or to "mothers of illegitimate children who receive welfare" created by the statute which, rather, deals with mothers of all illegitimate children. Finally, even if there were such a class created by

this statute that class is directly related to the public interest the statute is intended to assure as will be discussed below.

4. Valid, Articulated State Interests are Rationally Advanced by Section 52-440b.

In relevant part 42 U.S. (Section 602 (a)(17) reads as follows:

> "(a) A state plan for aid and services to needy families with children *must* . . .
>
> (17) provide —
>
> (A) for the development and implementation of a program under which the State agency will undertake —
>
> (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and
>
> (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support. . . .

Connecticut's General Statutes evidence a scheme of following the above directives mandated by Congress. The laws also fit into the much older Connecticut policy of requiring both parents to support their children, whether they are legitimate or illegitimate. In this regard Connecticut law has long provided for paternity proceedings to establish the identity of the illegitimate child's father and require him to pay support. It is further the policy of the state when it is contributing through public assistance to the support of children or other persons to obtain and enforce support orders against any

relatives legally liable to support the person receiving public assistance. Connecticut General Statute Sections 17-320, 17-59, 17-82e, 17-323a, 17-324, 46-10, 46-26, 53-304; see also Uniform Reciprocal Enforcement of Support Sections 17-327 through 17-355b and Paternity Proceedings Sections 52-435a through 52-445 (including the statute at issue here.)

This Court has recognized the State's right to recoup amounts expanded from the public funds in the interests of indigents. *James* v. *Strange* 407 U.S. 128, 138-139 (1972); *Rinaldi* v. *Yeager*, supra at 311. While recoupment may not be undertaken in an unconstitutional manner, the Court has also long held that Equal Protection does not require "things which are diffffferent in fact . . . to be treated in law as though they were the same." *Rinaldi* v. *Yeager*, supra at p. 309; *Tigner* v. *Texas*, supra at 147. It has no where in this action been contested that the only source of information available concerning the identity of the fathers of illegitimate children is their mothers. Here the state has provided the necessary sustenance for the illegitimate children in many cases and it is rational that it, the town which is giving the child general assistance, or the guardian or guardian ad litem of the child should proceed to enforce the primary obligation of the child's' parents, including the father of an illegitimate child, to support that youngster.

Further, the Appellants should not be heard to argue that because there is a possibility that some of the putative fathers cannot be located, may not be amenable to process, or may be judgment — proof the state's interest in recoupment is not a legitimate state purpose. In *James* v. *Strange*, supra at p. 133-134, it was clearly stated:

> "We do not inquire whether this statute is wise or desireable, or 'whether it is based on assumptions scientifically substantiated.' *Roth* v. *United States* 354 U.S. 476 (1957) (Separate Opinion of Harlan, J.) Misquided [sic] laws

may nonetheless be constitutional. It has been noted both in the briefs and at argument that only $17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended. [Footnote indicated $400,000 had been appropriated to fund the program in one year alone.] Our task, however, is not to weigh this statute's effectiveness ' it its constitutionality. Whether the returns under the statute justify the expense, time and efforts of state officials is for the ongoing supervision of the legislative branch."

Even if the Connecticut legislature had not seen fit to provide for recoupment from parents of children on AFDC, the federal statutes would require them to do so as noted above. In addition there is no evidence tending to prove the Appellants' claim that the amounts collected by such a program would be negligible. As is apparent from the data tables in evidence before this Court, 9.9% of the births recorded in Connecticut in 1971 were, on the face of the records, illegitimate, i.e., no father was named on the birth certificate (this obviously does not include those children born to married women who are later determined not to be issue of the marriage at the time of a dissolution of marriage or other judicial proceeding). See Appendix pp. 56-61. Thus, it is apparent that a substantial number of children born in Connecticut are illegitimate. Further, the transcripts and decision submitted by the Appellants show that far from all of the putative fathers are men of so little substance that they are unable to pay support. See *Norton* v. *Larracuente,* supra and *Welfare Commissioner* v. *A.M.M.*, Case V, Appendix of Childrens' Brief.

The only rights involved in this case which even approach the point of being fundamental are the rights of illegitimate children to support — to sustenance. However, this involves not only the right to current support but also the potential right to Society Security, Veterans' or other Benefits which

may later be available to the child following the death of his putative father. Appellants argue that for the purpose of obtaining these benefits) is not essential that paternity have been established in the past; however, it cannot be doubted that the closer one is in time to the events sought to be established the more likely it is that necessary evidence is available and the more easily the child's paternity can be determined. The further argument is made that in some cases a paternity action may establish that a man who has been voluntarily contributing to the support of an illegitimate child under the impression that he is the father actually is not the father so that child would lose the support payments he had been getting. This hardly seems probable as one who has voluntarily contributed support is not likely to be one who would contest a paternity action and it would be only in a contested paternity action that such a finding would be made. Further, if there should be a court finding that the man is not the child's father then it appears that it would not be equitable for the child to receive support from him (unless, of course, knowing he is not the father he chooses to continue to contribute gratuitously to the child's support.)

Finally, there is the psychological advantage which comes to the child from having his paternity established, from knowing who his father is. Also there is the security which comes from knowing that one's father is contributing what he can to support the child even though under order of the court and even if it is not in an amount large enough to remove the child from the Welfare rolls. There is, too, the fact that children who are not in need of welfare (and this includes those currently on welfare who may go off in the future) may, through the establishment of paternity and support, become able to receive more advantages such as a better education as a result of paternal support than the mother or guardian alone is able to provide for them.

It is submitted that if the Appellants wish to quarrel with what the Connecticut Legislature feels is in the best interest of illegitimate children that is the body to which they should present their complaints, not to the Courts. There is no fundamental, constitutionally protected interest of the Appellants which is affected by Section 52-440b. The statute establishes a reasonable classification because it bears a rational relationship to a legitimate state purpose. And, in any case, equal protection is not violated because the interests represented by the state in this case — those of the illegitimate child to support by his father and those of the public in promoting and protecting the relationship and duties of parent and child as well as to reimbursement from legally liable relatives for monies expended to support the child — are sufficiently compelling to justify state intervention in this instance.

CONCLUSION

The Appellee urges this Court to find that the Appellant-mothers have not established the existence of a constitutionally protected right to the absolute privacy that they assert. In addition, Section 52-440b does not conflict with any provision of the Federal Social Security Act, and in fact, Section 52-440b carries out the policies of 42 U.S.C. 602(a)(17)(i) and (ii). In view of the infringement upon the rights of the children as the Appellee has heretofore pointed out, of the purpose and reasonableness of Section 52-440b, and of the fact that there has been no denial of equal protection or due process the Appellant-mothers have failed to establish any error on the part of the lower Court.

The Appellee, Welfare Commissioner for the State of Connecticut, requests that the judgment of the court below be sustained and that this appeal be dismissed.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

By .....
MICHAEL ANTHONY ARCARI
Assistant Attorney General
Appellee's Attorney

Counsel for the Appellee wish to express their appreciation for the great amount of work done on the case below by former Assistant Attorney General James M. Higgins who has recently resigned from this office and to Gary G. Williams and Sharon Haskell for their assistance in preparing this brief.